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## Post-*Sterling* Developments: The Mootness of the Federal Reporter's Privilege Debate\*

### INTRODUCTION

The United States public consistently relies on press coverage of leaked material to hold government actors accountable for controversial operations.<sup>1</sup> Despite the important and prominent role of confidential sources in government reporting, commentators and jurists have debated whether or not reporters are protected from being required to reveal information about those confidential sources for over forty years. In other words, the existence of a reporter's privilege<sup>2</sup> is still debated. The incertitude began with the Supreme Court's enigmatic 1972 decision *Branzburg v. Hayes*<sup>3</sup>—the Court's only decision addressing the existence of a reporter's privilege.<sup>4</sup> The failure to clarify this decision has produced significant disagreements between the circuits regarding the existence and scope of the reporter's privilege.<sup>5</sup> This confusion among the circuit courts is embodied in the Fourth Circuit's 2013 decision

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1. See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 513–14 (2013) (noting that the “contours” of “[t]he Bay of Pigs, the Pentagon Papers, warrantless wiretapping by the National Security Agency at home, [and] targeted killings by the Central Intelligence Agency abroad . . . emerged . . . through anonymous disclosures of confidential information to the press”).

2. Reporter's privilege (which this Recent Development also refers to as “journalist-source privilege”) is defined as a “reporter's protection under constitutional or statutory law, from being compelled to testify about confidential information or sources.” *Journalist's Privilege*, BLACK'S LAW DICTIONARY (10th ed. 2014). Analogous to other legal privileges, such as attorney-client, spousal, and doctor-patient, the rationale for granting reporters and journalists special protection is based upon several considerations, including whether “(1) the relationship is one in which open communication is important to society; (2) in the absence of a privilege, such communication will be inhibited; and (3) the cost to the legal system of losing access to the privileged information is outweighed by the benefit to society of open communication in the protected relationship.” Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39, 40 (2005).

3. 408 U.S. 665 (1972).

4. See KATHLEEN ANN RUANE, CONG. RESEARCH SERV., RL34193, JOURNALISTS' PRIVILEGE: OVERVIEW OF THE LAW AND LEGISLATION IN RECENT CONGRESSES 1 (2011) (“The Supreme Court has written only one opinion on . . . journalists' privilege: *Branzburg v. Hayes* . . .”).

5. See *infra* Section I.B. This is despite the Supreme Court's claim that “[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.” *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

*United States v. Sterling*.<sup>6</sup> While the *Sterling* majority held that *Branzburg* foreclosed the possibility of providing special First Amendment protection to reporters against federal subpoenas in criminal cases,<sup>7</sup> the dissent found that this increased testimonial protection was entirely consistent with *Branzburg*.<sup>8</sup>

As exemplified by the divided three-judge panel in *Sterling*, the post-*Branzburg* debate has been convoluted. Since *Branzburg*, scholars have debated what effect, if any, increased protections for journalists would have on the collection and dissemination of information by the press. On one side, proponents of a reporter's privilege assert that protections facilitating and supporting press-society conversations are in the best interest of the public.<sup>9</sup> If these pivotal conversations are not subject to any legal protection, they argue, then fear of punishment, retaliation, injury to reputation, and loss of privacy will severely limit the quality and quantity of this communication, if not eliminate it altogether.<sup>10</sup> In contrast, others view the addition of journalist-source protections as an impediment to the truth-seeking function of the judiciary, since it has the effect of excluding evidence that "might be very trustworthy and highly relevant."<sup>11</sup> Additionally, these opponents view a reporter's privilege as unnecessary to the promotion of the free flow of information, arguing that investigative journalism has thrived in this country despite the absence of explicit First Amendment or congressional protections.<sup>12</sup>

And yet, while the clear judicial or legislative adoption—or even rejection—of a federal reporter's privilege is traditionally seen as the ideal solution to the *Branzburg* inconsistency, this Recent Development suggests that this proposed remedy may ultimately be futile. Congress and the Supreme Court's continued unwillingness to recognize a uniform federal reporter's privilege has adversely affected reporters and their sources by facilitating inconsistent and unfair treatment of reporters across jurisdictional lines. Meanwhile, technological

6. 724 F.3d 482 (4th Cir. 2013).

7. *Id.* at 505.

8. *Id.* at 523–24 (Gregory, J., dissenting).

9. See Stone, *supra* note 2, at 42.

10. *Id.* at 41.

11. E.g., Susan Webber Wright, *A Trial Judge's Ruminations on the Reporter's Privilege*, 29 U. ARK. LITTLE ROCK L. REV. 103, 104 (2006) (asserting journalist-source privilege should be left to legislators and limited to civil cases).

12. See Randall D. Eliason, *The Problems with the Reporter's Privilege*, 57 AM. U. L. REV. 1341, 1355 (2008) ("Watergate, Iran-Contra, Abu Ghraib, secret CIA prisons, domestic National Security Agency ('NSA') surveillance—all of these stories and countless others were reported through the use of confidential sources, and all without a federal shield law.").

advancements that allow the government to obtain the same confidential information without a subpoena<sup>13</sup> and the recently leaked guidelines governing the Federal Bureau of Investigation's ("FBI") use of National Security Letters ("NSLs") in the news media<sup>14</sup> indicate that the central threat to newsgathering is no longer the existence or lack of federal testimonial protection. Rather, because these developments hinge solely on government behavior outside the subpoena process, increased testimonial protection for reporters is no longer capable of remedying the negative effects on the newsgathering and news dissemination processes. Therefore, the more significant danger is now found in the government's ability to gather information regarding a reporter's source of confidential information through means other than judicial subpoenas. Consequently, an effective solution to the modern reporter's privilege debate must take this concern into account.

This Recent Development proceeds in three parts. Part I examines the *Branzburg* opinion, discusses the widely divergent treatment of *Branzburg* among federal and state courts, and analyzes the holding of and facts surrounding *Sterling*. Part II assesses the concerns resulting from the conflicting interpretations of *Branzburg* and surveys proposed solutions, specifically a federal shield law, the creation of a common-law privilege pursuant to Rule 501 of the Federal Rules of Evidence, and the Department of Justice ("DOJ") guidelines for subpoenaing reporters. Finally, Part III argues that the proposed solutions to the reporter's privilege debate fall short by failing to consider two recent developments. First, technological advancements now allow the government to readily access confidential reporter-source communications, which ultimately provide them with the same information that they would gain through a reporter's testimony in court. Second, the government's use of NSLs allows them to bypass the DOJ guidelines and subpoena authorization process altogether. These developments indicate that the newsgathering concerns regarding the lack of uniform journalist-source protections can no longer be remedied solely by providing a First Amendment testimonial privilege to reporters, effectively rendering the post-*Branzburg* reporter's privilege debate moot.

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13. See *infra* Section III.A.

14. See *infra* Section III.B.

## I. THE REPORTER'S PRIVILEGE DEBATE

A. *The Notorious Branzburg Ambiguity*

*Branzburg* has generally been viewed as the seminal decision on the reporter's privilege question.<sup>15</sup> This case involved the consolidation of three parallel cases in which three journalists sought to quash grand jury subpoenas compelling them to testify about information obtained while reporting.<sup>16</sup> The Court framed the ultimate question of the case as a narrow inquiry: "whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment."<sup>17</sup> Justice White, writing for the majority, explicitly rejected the petitioners' request for recognition of a federal reporter's privilege.<sup>18</sup> In support of this conclusion, Justice White argued that "the public interest in law enforcement and in ensuring effective grand jury proceedings" was stronger than any burden placed on reporters by a grand jury subpoena.<sup>19</sup> He also cited to the absence of existing data indicating that there would be a "significant constriction of the flow of news to the public" if the Court failed to shield reporters from grand jury subpoenas, especially considering the codependent relationship between the press and its informants.<sup>20</sup>

In contrast, Justice Stewart's dissent criticized the majority's "disturbing insensitivity" to society's need for an independent and constitutionally protected press,<sup>21</sup> stating that the Court's decision would hamper the functioning of the press by causing its sources of information to communicate less openly.<sup>22</sup> Instead, the dissent proposed a three-

15. See Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality, 1795-2005*, 43 SAN DIEGO L. REV. 425, 447 (2006).

16. *Branzburg v. Hayes*, 408 U.S. 665, 667-75 (1972). The three individual *Branzburg* cases were filed separately, but all involved the petitioners obtaining information that law enforcement believed could aid in preventing illegal activities: petitioner Branzburg of *The Courier-Journal* (Louisville) wrote two articles concerning drug use in Kentucky, while both petitioners Pappas of a Massachusetts television station and Caldwell of *The New York Times* reported on the Black Panthers. *Id.*

17. *Id.* at 667; see also THOMAS DIENES, LEE LEVINE & ROBERT C. LIND, *NEWSGATHERING AND THE LAW* § 16.05 (3d ed. 2005).

18. *Branzburg*, 408 U.S. at 690.

19. *Id.* at 690-91.

20. *Id.* at 693-95 ("[T]he relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena: quite often, such informants are members of a minority political or cultural group that relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public.").

21. *Id.* at 725 (Stewart, J., dissenting).

22. *Id.*; see also *United States v. Caldwell*, 408 U.S. 665, 721 (1992) (Douglas, J., dissenting) (noting that the Court's decision in *Branzburg* would force reporters to write with "more restrained pens").

prong test that the government must satisfy before they compel a journalist to testify before a grand jury.<sup>23</sup>

These seemingly straightforward opinions aside, the widespread confusion associated with the *Branzburg* decision stems from Justice Powell's fifth vote. Although he joined the opinion of the majority, his concurrence embraced a puzzling approach to the reporter's privilege issue. In his brief opinion, Justice Powell seemed to qualify the majority's clear rejection of a federal reporter's privilege:

The asserted claim to privilege should be judged on its facts by the striking of a *proper balance* between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a *case-by-case basis* accords with the tried and traditional way of adjudicating such questions.<sup>24</sup>

Because *Branzburg* was a five-to-four decision, Justice Powell's vote was crucial to achieving a majority. Consequently, Justice Powell's "case-by-case basis" qualification sheds light on lower courts' opposing interpretations of *Branzburg*: although Justice Powell technically concurred in the "limited nature of the Court's holding[.]"<sup>25</sup> some courts have nonetheless viewed his brief concurrence as the controlling opinion in this case.<sup>26</sup>

#### *B. Divergent Treatment of Branzburg Among Federal Courts*

One judge has noted that "Justice Powell's concurrence and the subsequent appellate history have made the lessons of *Branzburg* about as clear as mud."<sup>27</sup> Despite the initial postulation that *Branzburg* would be highly detrimental to reporters, federal courts only recently began interpreting this decision as an outright rejection of a constitutional

23. *Branzburg*, 408 U.S. at 740 (Stewart, J., dissenting) ("Governmental officials must, therefore, demonstrate that the information sought is clearly relevant to a precisely defined subject of governmental inquiry. They must demonstrate that it is reasonable to think the witness in question has that information. And they must show that there is not any means of obtaining the information less destructive of First Amendment liberties." (citations omitted)). The three-part test articulated by Justice Stewart is analogous, but not identical, to the one adopted by the Fourth Circuit in *LaRouche v. NBC*. See *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986) ("[C]ourts have developed a three part test: (1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information.").

24. *Branzburg*, 480 U.S. at 710 (Powell, J., concurring) (emphasis added).

25. *Id.* at 709.

26. See, e.g., *United States v. Sterling*, 724 F.3d 482, 523 (4th Cir. 2013) (Gregory, J., dissenting).

27. *Id.*

reporter's privilege.<sup>28</sup> Some circuits have held that the *Branzburg* majority, not Justice Powell's concurrence, is the controlling precedent.<sup>29</sup> For example, in declining to read Justice Powell's concurrence to "construct a broad, qualified newsreporters' privilege in criminal cases," the Fifth Circuit noted that "Justice Powell's separate writing only emphasizes that at a *certain point*, the First Amendment must protect the press from government intrusion."<sup>30</sup> Historically, holdings largely rejecting the reporter's privilege have been the minority approach; however, lower courts' reliance upon the *Branzburg* majority opinion, rather than the concurrence, have become increasingly popular in recent years.<sup>31</sup>

Other jurisdictions, however, have surprisingly viewed *Branzburg* as a plurality opinion, thereby relying on the narrowest opinion (Justice Powell's concurrence) as controlling precedent.<sup>32</sup> As explained by the

28. Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 553–55 (2007).

29. See *Sterling*, 724 F.3d at 495 ("By his own words, Justice Powell concurred in Justice White's opinion for the majority, and he rejected the contrary view of Justice Stewart.") (majority opinion); *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1149 (D.C. Cir. 2006) ("[W]hatever Justice Powell specifically intended, he joined the majority. Not only did he join the majority in name, but because of his joinder with the rest of a majority, the Court reached a result that rejected First Amendment privilege not to testify before the grand jury for reporters . . ."); *In re Special Proceedings*, 373 F.3d 37, 44–45 (1st Cir. 2004) ("In *Branzburg*, the Supreme Court flatly rejected any notion of a general-purpose reporter's privilege for confidential sources . . . Justice Powell, who wrote separately but joined in the majority opinion as the necessary fifth vote, also rejected any general-purpose privilege."); *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998) ("Although some courts have taken from Justice Powell's concurrence a mandate to construct a broad, qualified newsreporters' privilege in criminal cases, we decline to do so. Justice Powell's separate writing only emphasizes that at a certain point, the First Amendment must protect the press from government intrusion." (citation omitted)); *In re Grand Jury Proceedings*, 5 F.3d 397, 400 (9th Cir. 1993) ("It is important to note that Justice White's opinion is *not* a plurality opinion. Although Justice Powell wrote a separate concurrence, he also signed Justice White's opinion, providing the fifth vote necessary to establish it as the majority opinion of the court.").

30. *Smith*, 135 F.3d at 969 (emphasis added).

31. Papandrea, *supra* note 28, at 555.

32. See *Sterling*, 724 F.3d at 523 (Gregory, J., dissenting) ("Given this confusion, appellate courts have subsequently hewed closer to Justice Powell's concurrence . . . than to the majority opinion . . ."); *In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229, 232 (4th Cir. 1992) (applying Justice Powell's proposed balancing test and noting that "Justice Powell's opinion is the clearest explanation of how *Branzburg* applies to our facts"); *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 8 n.9 (2d Cir. 1982) ("Justice Powell cast the deciding vote in [*Branzburg*], and therefore his reservations are particularly important in understanding the decision."); *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981) (applying "[a]n approach similar to that described by Justice Powell in *Branzburg*" to a civil reporter's privilege case); *United States v. Criden*, 633 F.2d 346, 357 (3d Cir. 1980) (stating that this court had "previously adopted the formulation in the concurring opinion of Justice Powell in *Branzburg*" (citing *Riley v. City of Chester*, 612 F.2d 708, 715–16 (3d Cir. 1979)); *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974) ("Indeed, the *Branzburg* result appears to have

Second Circuit, “Justice Powell cast the deciding vote in [*Branzburg*], and therefore his reservations are particularly important in understanding the decision.”<sup>33</sup> Even when courts have concluded that *Branzburg* allows for some recognition of a First Amendment reporter’s privilege, they have disagreed on its scope. The Second Circuit, for example, has explicitly stated that there is “no legally-principled reason for drawing a distinction between civil and criminal cases” for reporter’s privilege purposes,<sup>34</sup> while the First Circuit requires an additional balancing test between the asserted First Amendment interests and the criminal defendant’s Fifth and Sixth Amendment rights.<sup>35</sup> To further complicate this debate, some circuits have refused to recognize the privilege solely in the specific context of grand jury proceedings, emphasizing their crucial role in the administration of justice.<sup>36</sup>

### C. United States v. Sterling

In 2013, the Fourth Circuit joined other circuits in interpreting the challenging question that *Branzburg*’s ambiguity presents: Are reporters privileged against federal grand jury subpoenas requiring them to testify about their knowledge of criminal activity?<sup>37</sup> Although this circuit had previously discussed the concept of a federal reporter’s privilege in civil cases<sup>38</sup> and criminal cases involving nonconfidential sources,<sup>39</sup> *United*

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been controlled by the vote of Justice Powell.”); *see also* 2 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 14:3.2.B (4th ed. 2010) (“Because Justice White’s plurality opinion was rather enigmatic and Justice Powell’s was the pivotal fifth vote, his concurring opinion has been treated by some courts and commentators as authoritative.”); Papandrea, *supra* note 28, at 554 (“Because Justice Powell cast the deciding vote in *Branzburg*, many courts and commentators have read his concurring opinion as the controlling opinion in the case.”).

33. *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d at 8 n.9.

34. *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983); *see also* *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (“[I]nformation may only be compelled from a reporter claiming privilege if the party requesting the information can show that it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources.”).

35. *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988).

36. *See In re Grand Jury Proceedings*, 5 F.3d 397, 401 (9th Cir. 1993) (recognizing that although the court had previously balanced conflicting interests when determining the existence of a reporter’s privilege in non-grand jury proceedings, they did so because “that case—unlike *Branzburg* or the present case—did not involve testimony before a grand jury”); *Storer Commc’ns., Inc. v. Giovan*, 810 F.2d 580, 587 (6th Cir. 1987) (“[*Branzburg* held that] the first amendment accords no privilege to news reporters against appearing before a grand jury . . . since requiring reporters to appear and testify before state and federal grand juries does not impact unconstitutionally upon their ability to gather news.”).

37. *Sterling*, 724 F.3d at 482, 492.

38. *See LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986).

39. *See In re Shain*, 978 F.2d 850, 851 (4th Cir. 1992).



*States v. Sterling* was the first case in which the Fourth Circuit closed the door on extending this protection to confidential sources in criminal cases.<sup>40</sup> With *Sterling*, the Fourth Circuit joined other circuits that have selectively read the ambiguous *Branzburg* opinion to support divergent results in criminal and civil cases.<sup>41</sup>

### 1. A Divided Fourth Circuit

The *Sterling* dispute stems from a book, *State of War: The Secret History of the CIA and the Bush Administration*, published in 2006 by *The New York Times* author James Risen.<sup>42</sup> In this book, Risen revealed classified information regarding a Central Intelligence Agency (“CIA”) operation referred to by the Fourth Circuit as “Classified Program No. 1.”<sup>43</sup> Although Risen did not reveal his sources for the classified material, extensive evidence led the government to believe that ex-CIA agent Jeffrey Sterling was Risen’s informant; the most notable evidence was the exchange of nineteen phone calls between *The New York Times* office and Sterling’s house and twenty-seven emails between Risen and Sterling.<sup>44</sup>

40. *Sterling*, 724 F.3d at 530 (Gregory, J., dissenting).

41. The D.C. Circuit, for example, upheld the application of a qualified First Amendment reporter’s privilege in the civil context, where the reporter was neither a party to the claims nor protecting himself from liability, *see Zerilli v. Smith*, 656 F.2d 705, 714–15 (D.C. Cir. 1981), but then subsequently refused to do the same in a criminal case, specifically noting that “[e]ven if *Zerilli* states the law applicable to civil cases, this is not a civil case[.]” *In re Judith Miller*, 438 F.3d 1141, 1149 (D.C. Cir. 2006). Similarly, the Ninth Circuit applied a qualified privilege to protect an “investigative author” from testifying in a defamation suit about confidential interviews he conducted with the defendant, *Shoen v. Shoen*, 5 F.3d 1289, 1290–92 (9th Cir. 1992), yet also upheld a criminal contempt order against a newsman who refused to reveal his confidential sources to a trial judge attempting to discover who had violated his publicity order in the highly publicized Charles Manson murder trial, *Farr v. Pitchess*, 522 F.2d 464, 466, 469 (9th Cir. 1975).

42. *Sterling*, 724 F.3d at 490; *see also* JAMES RISEN, *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION* (2006).

43. *Sterling*, 724 F.3d at 490.

44. *Id.* at 489–90. The government based its conclusion off Sterling’s prior interactions with the CIA and Risen. *Id.* at 488–90. While working for the CIA in 1998, Sterling’s assignment was Classified Program No. 1, but he was reassigned only two years later. *Id.* at 488. Soon after Sterling’s reassignment, Risen published two articles in *The New York Times* discussing the CIA, one of which explicitly named Sterling as his source. *Id.* at 488–89; James Risen, *A Nation Challenged: The Intelligence Agency; Secret C.I.A. Site in New York Was Destroyed on Sept. 11*, N.Y. TIMES (Nov. 4, 2001), <http://www.nytimes.com/2001/11/04/us/nation-challenged-intelligence-agency-secret-cia-site-new-york-was-destroyed.html> [https://perma.cc/SA89-WZBQ]; James Risen, *Fired by C.I.A., He Says Agency Practiced Bias*, N.Y. TIMES (Mar. 2, 2002), <http://www.nytimes.com/2002/03/02/us/fired-by-cia-he-says-agency-practiced-bias.html> [https://perma.cc/M5SK-UY52]. In 2003, Sterling informed the CIA that he had classified information concerning Classified Program No. 1 and that he intended to publish a story about it in *The New York Times*. *Sterling*, 724 F.3d at 489. In addition to the phone calls

In May of 2011, after Sterling had been indicted by the grand jury on six counts of unauthorized retention and communication of national defense information,<sup>45</sup> the government issued a subpoena seeking Risen's testimony regarding his source for the classified CIA information published in *State of War*.<sup>46</sup> Risen moved to quash the subpoena, asserting that he was "protected from compelled testimony by the First Amendment or, in the alternative, by a federal common-law reporter's privilege."<sup>47</sup> The district court applied the three-part reporter's privilege test previously used by the Fourth Circuit in the civil case *LaRouche v. NBC*.<sup>48</sup> This application ultimately led to a ruling in favor of Risen upon a finding that the government had failed to satisfy two out of the three requirements.<sup>49</sup>

On appeal, however, the Fourth Circuit reversed the district court's decision and held that *Branzburg* precluded the recognition of a First Amendment reporter's privilege in criminal cases.<sup>50</sup> The first line of Judge Traxler's stark majority opinion states: "There is no First Amendment testimonial privilege, absolute or qualified, that protects a reporter from being compelled to testify . . . in criminal proceedings."<sup>51</sup> Relying on *Branzburg*, the majority noted that the "controlling authority is clear[.]"<sup>52</sup> since the Supreme Court "in no uncertain terms" rejected the idea of providing special First Amendment protection to reporters.<sup>53</sup> In rejecting the dissent's "strained reading" of Justice Powell's concurrence as a "tacit endorsement of Justice Stewart's dissenting opinion," Judge Traxler instead concluded that "Justice Powell's concurrence *expresses no disagreement* with the majority's

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and emails exchanged between Risen and Sterling, there were also two classified meetings at which Sterling was the only common attendee. *See id.* at 489–90.

45. *Sterling*, 724 F.3d at 490. Sterling was also indicted by the grand jury for one count of unlawful retention of national defense information, one count of mail fraud, one count of unauthorized conveyance of government property, and one count of obstruction of justice. *Id.*

46. *Id.*

47. *Id.*

48. 780 F.2d 1134 (4th Cir. 1986). According to this test, the court considers "(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information" before mandating disclosure. *Id.* at 1139 (citing *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, *modified*, 628 F.2d 932 (5th Cir. 1980)).

49. *See Sterling*, 724 F.3d at 491. ("The district court held that . . . the Government had failed to demonstrate that the information was unavailable from other means and that it had a compelling interest in presenting it to the jury.").

50. *Id.* at 492, 499.

51. *Id.* at 492.

52. *Id.* at 494.

53. *Id.* at 492 (quoting *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1146 (D.C. Cir. 2006)).

determination that reporters are entitled to no special privilege[.]”<sup>54</sup> Moreover, despite the Fourth Circuit’s prior reliance upon *Branzburg* in *LaRouche*, the *Sterling* majority refused to apply this test in the criminal context, specifically noting that *LaRouche* “offers no authority for us to recognize a First Amendment reporter’s privilege in this *criminal* proceeding.”<sup>55</sup>

In a lengthy dissent, Judge Gregory argued that the *Branzburg* opinion actually *did* allow for the recognition of a qualified reporter’s privilege and that prior Fourth Circuit precedent also supports the application of this privilege in criminal cases “given the right circumstances.”<sup>56</sup> Rather than viewing Justice Powell’s concurrence as ancillary to the majority opinion, Judge Gregory advocated for the adoption of a qualified privilege to be evaluated by the three-part *LaRouche* test, with the addition of two factors for cases involving national security issues.<sup>57</sup> In direct opposition to the majority, Judge Gregory specifically noted that this view does “not depart from established precedent, to the contrary, it adheres to Justice Powell’s concurrence in *Branzburg*[.]”<sup>58</sup>

## 2. The Fate of James Risen and Jeffrey Sterling

On January 12, 2015—nearly two years after the Fourth Circuit rendered its decision—then-Attorney General Eric Holder announced he was withdrawing the grand jury subpoena issued against James Risen, thereby ending the seven-year battle over the confidential *State of War* sources.<sup>59</sup> This decision was announced several months after the U.S. Supreme Court denied Risen’s request for review<sup>60</sup> but mere days after

54. *Id.* at 495 (emphasis added).

55. *Id.* at 497.

56. *Id.* at 523–24 (Gregory, J., dissenting). Judge Gregory cited to a prior Fourth Circuit case as a basis for this assertion, noting that “although the reporter’s privilege was not recognized in ‘the circumstances of this case,’ it is clear to me that we have acknowledged that a reporter’s privilege attaches in criminal proceedings given the right circumstances.” *Id.* at 524 (quoting *In re Shain*, 978 F.2d 850, 854 (4th Cir. 1992)).

57. *Id.* at 524–25 (“[I]n cases involving questions of national security, if the three-part *LaRouche* test is satisfied in favor of the reporter’s privilege, I would require consideration of two additional factors: the harm caused by the public dissemination of the information, and the newsworthiness of the information conveyed.”).

58. *Id.* at 525.

59. United States’ Motion in Limine to Exclude James Risen as an Unavailable Witness at 1, *United States v. Sterling*, 818 F. Supp. 2d 945 (E.D. Va. 2015) (No. 1:10cr485), 2015 WL 333047 [hereinafter Motion in Limine]; Matt Apuzzo, *Times Reporter Will Not Be Called to Testify in Leak Case*, N.Y. TIMES (Jan. 12, 2015), <http://www.nytimes.com/2015/01/13/us/times-reporter-james-risen-will-not-be-called-to-testify-in-leak-case-lawyers-say.html> [https://perma.cc/48TZ-H69K].

60. *United States v. Sterling*, 134 S. Ct. 2696 (2014) (denying certiorari review).

*The New York Times* journalist unapologetically refused to testify during a pretrial hearing.<sup>61</sup> Not only did Risen withhold any information he had at the hearing, he also stated that he would abstain from answering questions at trial.<sup>62</sup> Because such testimony “would simply frustrate the truth-seeking function of the trial[,]” the government filed a motion in limine to exclude Risen as an unavailable witness.<sup>63</sup>

Jeffrey Sterling, however, was not as lucky as his alleged confidant. After a seemingly endless legal feud, on January 26, 2015, Jeffrey Sterling was found guilty on ten counts of unauthorized disclosure of national defense information.<sup>64</sup> In May of 2015, Sterling was sentenced to forty-two months in prison,<sup>65</sup> notwithstanding the prosecution’s suggested sentence of 235 to 293 months.<sup>66</sup>

## II. THE PROBLEMS RESULTING FROM INCONSISTENCY AND PROPOSED SOLUTIONS

### A. *Concerns with Conflicting Branzburg Interpretations*

As exemplified by the *Sterling* controversy, the perpetual inconsistency stemming from *Branzburg* has daunting repercussions for the fair treatment of reporters and implicates federalism concerns. On a fundamental level, conflicting *Branzburg* interpretations lead to inconsistent treatment and punishment of reporters. Because of these drastic jurisdictional variations, a reporter’s legal fate may be entirely dependent on where the reporter resides or chooses to conduct interviews.<sup>67</sup> This widely varying treatment of reporters appears to create a lose-lose situation for reporters wishing to publish content

61. Matt Apuzzo, *Defiant on Witness Stand, Times Reporter Says Little*, N.Y. TIMES (Jan. 5, 2015), <http://www.nytimes.com/2015/01/06/us/james-risen-in-tense-testimony-refuses-to-offer-clues-on-sources.html> [https://perma.cc/X6WN-LVN2]. The prosecution’s stated purpose of the hearing was “to allow the parties and the Court an opportunity to see which questions, if any, Mr. Risen would answer and to provide sufficient time to resolve any disputes . . . .” Motion in Limine, *supra* note 59, at 1.

62. Motion in Limine, *supra* note 59, at 1.

63. *Id.* at 2.

64. Verdict Form at 1–3, *Sterling*, 818 F. Supp. 2d 945 (No. 1:10cr485), 2015 WL 798700.

65. Steven Nelson, *Jeffrey Sterling Sentenced to 42 Months for Talking to Reporter*, U.S. NEWS (May 11, 2015, 5:18 PM), <http://www.usnews.com/news/articles/2015/05/11/jeffrey-sterling-sentenced-to-42-months-for-talking-to-reporter> [https://perma.cc/7LKK-GXFK].

66. United States’ Memorandum in Aid of Sentencing at 6, *Sterling*, 818 F. Supp. 2d 945 (No. 1:10cr485), 2015 WL 1905995.

67. See Ryan C. Stevens, *Keeping the News Domestic: Why a Toxic Environment for the American Press and Ready Access to Foreign Media Organizations Like Wikileaks Compel the Rapid Adoption of a Federal Reporters’ Privilege*, 66 HASTINGS L.J. 1463, 1474–75 (2015) (“These inconsistencies subject a reporter’s ability to gather news to vastly different legal standards depending on the district where she resides.”).

exposing criminal activity, especially those situated in jurisdictions that have not expressly adopted or rejected a reporter's privilege in criminal cases: those journalists must either publish the criminal behavior and take the risk of a court declining the privilege or avoid that risk by choosing to forgo publication altogether.

But the practical effect of this legal inconsistency on the livelihood of reporters facing criminal subpoenas is not limited to their professional careers or reputations. The highly publicized D.C. Circuit case *In re Judith Miller*<sup>68</sup> exemplifies what is truly at stake for reporters in these cases. While the case was on appeal, *The New York Times* journalist Judith Miller spent eighty-five days in jail for her continued refusal to reveal the identity of her confidential source.<sup>69</sup> Similarly, a reporter for *The Los Angeles Herald Examiner* was held in contempt for forty-six days after failing to disclose his source for leaked testimony from the Charles Manson murder trial.<sup>70</sup> And in 2007, video blogger Josh Wolf became the "longest-jailed journalist" to date after he refused to comply with a subpoena that ordered him to testify about criminal events that took place during a San Francisco protest.<sup>71</sup> Thus, even though prison sentences for reporters are not particularly commonplace,<sup>72</sup> these examples nonetheless reaffirm that reporters who fail to disclose a confidential source can face incarceration in many jurisdictions.

Additionally, the division among federal jurisdictions regarding protections for journalists has been criticized by many states for its deleterious effect on state shield laws.<sup>73</sup> When *Branzburg* was decided, the majority of states did not provide statutory protection for reporters.<sup>74</sup> Now, over forty years later, nearly all states provide some form of a qualified reporter's privilege, either through judicial or

68. *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2006).

69. See RUANE, *supra* note 4, at 1 (noting that Miller spent eighty-five days in jail for refusing to cooperate in a grand jury investigation relating to the leak of the identity of an undercover CIA agent).

70. See *Farr v. Pitchess*, 522 F.2d 464, 466, 469 (9th Cir. 1975); Jack Jones, *Reporter Farr Dies; Went to Jail to Protect Sources*, L.A. TIMES (Mar. 6, 1987), [http://articles.latimes.com/1987-03-06/local/me-5024\\_1\\_shield-law](http://articles.latimes.com/1987-03-06/local/me-5024_1_shield-law) [<https://perma.cc/26W3-XH6Z>].

71. See *In re Grand Jury Subpoena*, Joshua Wolf, 201 F. App'x 430, 431–32 (9th Cir. 2006); Elizabeth Soja, *Behind Bars: Josh Wolf has Become the Longest-Jailed Journalist in Recent American History*, 31 NEWS MEDIA & L. 14, 14 (2007) (noting that on February 6, 2007, Wolf had been in jail for 169 days).

72. See generally *Paying the Price: A Recent Census of Reporters Jailed or Fined for Refusing to Testify*, REPORTERS COMMITTEE FOR FREEDOM PRESS, <http://www.rcfp.org/jailed-journalists> [<https://perma.cc/BV9H-6CY8>] (providing an updated list of all known jailings and finings of reporters).

73. James Thomas Tucker & Stephen Wermiel, *Enacting A Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason*, 57 AM. U. L. REV. 1291, 1310 (2008).

74. *Branzburg v. Hayes*, 408 U.S. 665, 689 (1972).

legislative action.<sup>75</sup> This, however, has given rise to an entirely separate conflict: if a federal proceeding necessitates the disclosure of a confidential news source, the laws governing the state in which the publication occurred are wholly irrelevant.<sup>76</sup> Essentially, even if the publication occurs in a state that provides complete protection for all confidential reporter-source communications, that protection is not applicable in federal court.<sup>77</sup>

The inconsistency between federal and state laws within the same jurisdiction serves to undermine the interests the states that have enacted shield laws sought to protect.<sup>78</sup> As noted by the attorneys general of thirty-four states and the District of Columbia,

A federal policy that allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and protect “buck[s] file (sic) clear policy of virtually all states,” and undermines both the purpose of the shield laws, and the policy determinations of the State courts and legislatures that adopted them.<sup>79</sup>

Indeed, the Supreme Court itself has noted in its prior discussion of the psychotherapist-patient privilege that “any State’s promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court.”<sup>80</sup> And considering the near-uniform acknowledgment of the importance of confidential reporter-source communications among the states, the lack of corresponding federal protection appears to have “undercut the State shield laws just as much as the absence of a federal privilege.”<sup>81</sup>

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75. Since *Branzburg* made clear that states were free to fashion their own protections for reporters, *id.* at 706, thirty-three states and the District of Columbia have done so by enacting “shield statutes[.]” and another sixteen states have recognized a reporter’s privilege judicially, see HENRY COHEN, CONG. RESEARCH SERV., RL32806, JOURNALISTS’ PRIVILEGE TO WITHHOLD INFORMATION IN JUDICIAL AND OTHER PROCEEDINGS: STATE SHIELD STATUTES 1 (2007).

76. See FED. R. EVID. 1101.

77. See *id.* For a detailed analysis of the conflicting state and federal laws, see generally Theodore Campagnolo, *The Conflict Between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues*, 38 GONZ. L. REV. 445, 478–91 (2002–2003) (concluding that shield laws in thirty-eight states most likely have at least some conflict with their respective federal circuit laws).

78. Brief Amici Curiae of the States of Okla. et al. in Support of Petitioners, *Miller v. United States*, 545 U.S. 1150 (2005) (Nos. 04-1507, 04-1508), 2005 WL 1317523, at \*2–3.

79. *Id.* at \*2–3 (citation omitted).

80. *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996).

81. Brief Amici Curiae of the States of Okla. et al. in Support of Petitioners, *supra* note 78, at \*3.

*B. Proposed Solutions*

## 1. Federal Shield Law

Despite leaving Congress the freedom to “fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned[.]”<sup>82</sup> Congress has thus far failed to heed the Court’s advice and enact a law protecting journalists from federal subpoenas. According to several scholars that have examined Congress’s various attempts to create a federal shield law:

For over three decades, Congress considered numerous federal reporters’ shield bills. . . . All told, approximately one hundred bills to create a shield law were introduced by 1978. None of the bills made it to a floor vote. Despite the acknowledged need for congressional action, no federal reporters’ shield law had been enacted for thirty-five years after *Branzburg*.<sup>83</sup>

More recently, in 2007 and 2009, members of Congress proposed several bills that would have created a federal reporter’s privilege.<sup>84</sup> Although the passage of a federal shield law in 2007 appeared “inevitable” due to the high approval margin in the House of Representatives,<sup>85</sup> the full Senate never voted on these bills.<sup>86</sup> Again in 2013, analogous acts were introduced in both the House and the Senate but neither was passed.<sup>87</sup> Moreover, Congress’s inability to enact a federal shield law is not the only problem. While the reaction from the media has not been entirely negative,<sup>88</sup> the proposed shield laws have nonetheless been criticized for their narrow definition of what should constitute a “journalist” subject to the proffered protections.<sup>89</sup> The proposals have also been questioned in light of a proposed exception

82. *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972).

83. Tucker & Wermiel, *supra* note 73, at 1310–11.

84. See RUANE, *supra* note 4, at 4, 9.

85. Tucker & Wermiel, *supra* note 73, at 1293–94.

86. See RUANE, *supra* note 4, at Summary, 4.

87. S. 987, 113th Congress (2013); H.R. 1962, 113th Congress (2013).

88. Editorial Board, *A Shield Law Is Necessary to Protect U.S. Journalists*, WASH. POST (Sept. 22, 2013), [https://www.washingtonpost.com/opinions/a-shield-law-is-necessary-to-protect-us-journalists/2013/09/22/a3449104-20af-11e3-966c-9c4293c47ebe\\_story.html](https://www.washingtonpost.com/opinions/a-shield-law-is-necessary-to-protect-us-journalists/2013/09/22/a3449104-20af-11e3-966c-9c4293c47ebe_story.html) [https://perma.cc/2V7P-G6KW] (noting that “the [proposed] bill would guarantee protections to a wide range of people who meet certain tell-tale characteristics” and would “also build flexibility into the system to recognize those who don’t fit neatly into the mold”).

89. See Lauren J. Russell, Comment, *Shielding the Media: In an Age of Bloggers, Tweeters, and Leakers, Will Congress Succeed in Defining the Term “Journalist” and in Passing a Long-Sought Federal Shield Act?*, 93 OR. L. REV. 193, 219 (2014) (noting that the employment requirement for journalists is overly restrictive and excludes nontraditional media).

allowing journalists to still be subpoenaed if it means national security is at risk.<sup>90</sup>

## 2. Rule 501 of the Federal Rules of Evidence

Another potential solution to the *Branzburg* inconsistency stems from Federal Rule of Evidence 501, which provides that “[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege” unless provided otherwise by the Constitution, a federal statute, or the Supreme Court.<sup>91</sup> According to the Rule’s commentary, the original text of Rule 501 delineated nine specific privileges that the federal courts would have been required to recognize.<sup>92</sup> In rejecting this enumerated list, Congress “left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts . . . in the light of reason and experience.”<sup>93</sup> Several years after this Rule’s creation, the Supreme Court recognized a psychotherapist-patient privilege under Rule 501.<sup>94</sup> Thus, Rule 501 allows courts to develop new privileges.<sup>95</sup>

As exemplified through the *Sterling* majority’s discussion of Rule 501,<sup>96</sup> when taken independently, this rule does very little to remedy the inconsistent treatment of *Branzburg*. Of course, an essential aspect of solving this issue is for the Court to actually grant certiorari over a federal reporter’s privilege case—something it does not appear keen on doing, based on its recent denials of certiorari in high-profile cases like *In re Judith Miller*<sup>97</sup> and *Sterling*.<sup>98</sup>

90. See Trevor Timm, *White House Shield Bill Could Actually Make It Easier For the Government to Get Journalists’ Sources*, FREEDOM PRESS FOUND. (May 16, 2013), <https://freedom.press/news-advocacy/white-house-shield-bill-could-actually-make-it-easier-for-the-government-to-get-journalists-sources/> [<https://perma.cc/MJ86-CRRJ>] (noting that this proposed exception is problematic because leak investigations almost always implicate national security concerns, and thus the actual protection the law would provide to journalists would be minimal).

91. FED. R. EVID. 501.

92. FED. R. EVID. 501 advisory committee’s note to 2011 amendment.

93. *Id.*

94. See *Jaffee v. Redmond*, 518 U.S. 1, 8–10 (1996).

95. See *id.* at 8; *United States v. Sterling*, 724 F.3d 482, 501 (4th Cir. 2013).

96. Judge Traxler argued that the Supreme Court’s use of Rule 501 in prior cases “does not authorize [the court] to ignore *Branzburg* or support [the] recognition of a common-law reporter-source privilege” in *Sterling*. *Sterling*, 724 F.3d at 501. While the majority accepted that previous use of Rule 501 by the Supreme Court indicates that the Court might rule differently on the common-law privilege issue in the future, the Fourth Circuit was “not at liberty to take that critical step.” *Id.*

97. *Miller v. United States*, 545 U.S. 1150 (2005) (denying certiorari).

98. *Risen v. United States*, 134 S. Ct. 2696 (2014) (denying certiorari).



### 3. Department of Justice Guidelines

In spite of the congressional and judicial failure to solidify an unambiguous rule regarding federal reporter subpoenas, the executive branch has been comparatively successful. In 1970, the DOJ announced guidelines governing the issuance of federal subpoenas with the stated intent of protecting the news media from law enforcement procedures “that might unreasonably impair newsgathering activities.”<sup>99</sup> Pursuant to these guidelines, subpoenas targeted at nonconsenting reporters require prior approval from the attorney general, and should only be authorized after “all reasonable alternative attempts have been made to obtain the information from alternative sources[.]” the DOJ has pursued negotiations with the reporter, and the target of the subpoena has been notified.<sup>100</sup> Regarding the content of the targeted information, these guidelines note that obtaining “peripheral, nonessential, or speculative information” is not a proper basis for the issuance of a subpoena in either the criminal or civil context.<sup>101</sup>

Yet, despite these provisions, this policy is a guideline, rather than a law. These guidelines were created only to advise DOJ prosecutors about when to pursue reporters in leak investigations, not to establish a compulsory subpoena process for prosecutors.<sup>102</sup> Because the guidelines are merely instructive rather than binding, a reporter like Risen cannot argue that the DOJ failed to follow the guidelines in a motion to quash a subpoena.<sup>103</sup> This is a problem, not only because reporters like Risen are unable to require enforcement of such guidelines, but also because reporters like Risen do not know when the guidelines will be followed and when they will not. Additionally, these guidelines only apply to subpoenas sought by the DOJ, which means they do not apply to special

99. 28 C.F.R. § 50.10(a)(1) (2016); *Branzburg v. Hayes*, 408 U.S. 665, 707 n.41 (1972).

100. *See* § 50.10(a)(3).

101. *Id.* § 50.10(c)(4).

102. *See Branzburg*, 408 U.S. at 707 n.41; Grant Penrod, *A Problem of Interpretation*, NEWS MEDIA & L., Fall 2004, at 9 (“For the most part, [the guidelines] are considered purely advisory, and the Department of Justice can enforce them—or not enforce them—as it sees fit.”); Sari Horwitz, *Holder Tightens Investigators’ Guidelines in Cases Involving News Media*, WASH. POST (Jan. 14, 2015), [https://www.washingtonpost.com/world/national-security/holder-tightens-investigators-guidelines-in-cases-involving-news-media/2015/01/14/1f4065d6-9c0f-11e4-96cc-e858eba91ced\\_story.html](https://www.washingtonpost.com/world/national-security/holder-tightens-investigators-guidelines-in-cases-involving-news-media/2015/01/14/1f4065d6-9c0f-11e4-96cc-e858eba91ced_story.html) [<https://perma.cc/MQ4Y-B2P2>].

103. *See* 28 C.F.R. § 50.10(j) (“This policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.”); Penrod, *supra* note 102, at 4 (“The biggest obstacle to using the Department of Justice guidelines to oppose subpoenas is that courts do not enforce the guidelines as law.”).

prosecutors.<sup>104</sup> Consequently, the DOJ policy has been criticized on grounds that it is both insufficient in scope and unenforceable in practice, reinforcing existing concerns about the unpredictable and inconsistent contours of the reporter's privilege.<sup>105</sup>

Even before the *Sterling* controversy, the Obama administration's reputation for harshly prosecuting leakers seemed to only exacerbate the growing concerns over the leniency of these guidelines. Despite President Obama's promise to "establish a system of transparency,"<sup>106</sup> the DOJ prosecuted eight leakers during his tenure—a shocking number, considering only three total leakers had ever been prosecuted before President Obama took office.<sup>107</sup> In addition to the sheer volume of prosecutions, inconsistent sentencing in recent whistleblower cases has also been a subject of scrutiny. While high-ranking officials have received a slap on the wrist for disclosing confidential information, lower-ranking officials have been more severely punished for committing identical offenses.<sup>108</sup>

104. *In re Special Proceedings*, 373 F.3d 37, 43–44, 44 n.3 (1st Cir. 2004) (noting that "[t]he regulations are not themselves binding on the special prosecutor" because "a special prosecutor is not a member of the Justice Department").

105. See Penrod, *supra* note 102, at 4, 5–7.

106. *Open Government Initiative*, WHITE HOUSE, <https://www.whitehouse.gov/open> [<https://perma.cc/JK3U-C94B>].

107. See Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 454–55 (2014). Two of these cases (including *Sterling*'s) were inherited from the Bush administration, so it may be argued that these are not "his" prosecutions. Jon Greenberg, *CNN's Tapper: Obama Has Used Espionage Act More Than All Previous Administrations*, PUNDITFACT (Jan. 10, 2014, 10:00 AM), <http://www.politifact.com/punditfact/statements/2014/jan/10/jake-tapper/cnns-tapper-obama-has-used-espionage-act-more-all/> [<https://perma.cc/XQ7B-ZC23>]; Peter Maass, *The Whistleblower's Tale: How Jeffrey Sterling Took on the CIA—and Lost Everything*, INTERCEPT (June 18, 2015, 3:06 PM), <https://theintercept.com/2015/06/18/jeffrey-sterling-took-on-the-cia-and-lost-everything/> [<https://perma.cc/SG3K-2DW3>].

108. Peter Maass, *Petraeus Plea Deal Reveals Two-Tier Justice System for Leaks*, INTERCEPT (Mar. 3, 2015, 5:30 PM), <https://theintercept.com/2015/03/03/petraeus-plea-deal-reveals-two-tier-justice-system-leaks/> [<https://perma.cc/GPB6-93AS>]. In March of 2015, former CIA director David Petraeus pleaded guilty to one misdemeanor, unauthorized removal and retention of classified information. *Id.* According to his plea deal, Petraeus kept records of highly sensitive military and intelligence information while leading forces in Afghanistan and lent them to his girlfriend when he returned from his deployment. *Id.* Petraeus did not serve any jail time, allowing him to "focus on his lucrative post-government career as a partner in a private equity firm and a worldwide speaker on national security issues." Michael Schmidt & Matt Apuzzo, *Petraeus Reaches Plea Deal Over Giving Classified Data to His Lover*, N.Y. TIMES (Mar. 3, 2015), <http://www.nytimes.com/2015/03/04/us/petraeus-plea-deal-over-giving-classified-data-to-lover.html> [<https://perma.cc/MR4G-UY4A>]. In contrast, Stephen Kim, a former State Department official, pleaded guilty to the exact same offense as Petraeus, but received a thirteen-month prison sentence. Maass, *supra*. Unlike Petraeus, Kim had merely discussed a classified report with Fox News reporter James Rosen. *Id.* Similarly, neither former Attorney General Alberto Gonzales nor ex-CIA director John Deutch were

On January 14, 2015—two days after his decision to forgo compelling Risen's testimony—then-Attorney General Holder announced expanded revisions of DOJ's policy regarding obtaining information from, or records of, members of the media.<sup>109</sup> One change in particular appeared to have the most drastic potential impact. The new guidelines substituted the term "ordinary newsgathering activities" with simply "newsgathering activities."<sup>110</sup> Before the change, the attorney general only had to authorize attempts by DOJ investigators to obtain information from journalists as it pertained to "ordinary newsgathering activities[.]"<sup>111</sup> This possibly gave DOJ investigators too much discretion to determine what constituted "*ordinary* newsgathering activities" and thus what situations required the approval of the attorney general.<sup>112</sup> That is, if the investigators thought it would be difficult to obtain attorney general approval, they could classify the "newsgathering activity" as "non-ordinary," and then would not need attorney general approval. The 2015 revision eliminated this problem by requiring the attorney general to authorize subpoenas for investigations concerning *all* newsgathering activities.<sup>113</sup>

While the guideline revisions—at least when coupled with the decision not to subpoena Risen—were seen by some news organizations as a "step in the right direction[.]"<sup>114</sup> the actual impact of these efforts on the newsgathering process is far from certain. First, although the revisions seem to indicate a willingness to compromise in the future, these changes do not remedy the enforceability issues or loopholes that have previously been criticized as the most problematic aspects of these guidelines.<sup>115</sup> The guidelines themselves are still not legally binding on the government, they still do not apply to special prosecutors, and their scope still does not extend beyond judicial subpoena authorization.

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charged for keeping classified government information in their homes, while Donald Sachtleben, a former FBI bomb technician, was sentenced to nearly four years for discussing classified information with *The Associated Press*. Schmidt & Apuzzo, *supra*.

109. Memorandum from the Office of the Attorney General to All Department Employees (Jan. 14, 2015), <https://www.justice.gov/file/317831/download> [<https://perma.cc/AE5M-XYDL>] [hereinafter Updated DOJ Policy]. The Attorney General deemed the revisions that he had issued in early 2014 unsatisfactory based on comments from federal prosecutors and news media representatives. *Id.*

110. *See id.*; Horwitz, *supra* note 102.

111. *See* Updated DOJ Policy, *supra* note 109.

112. *See* Horwitz, *supra* note 102.

113. *See* Updated DOJ Policy, *supra* note 109; *see also* Horwitz, *supra* note 102.

114. *See* Horwitz, *supra* note 102 (quoting Steve Coll, dean of the Columbia University Graduate School of Journalism).

115. *See supra* text accompanying note 105.

Second, because the attorney general must approve the subpoenas, unless subsequent attorneys general share former Attorney General Holder's desire to protect the media's role in ensuring the free flow of information, these changes will ultimately be futile. This concern is especially justified by Attorney General Jeff Sessions's<sup>116</sup> outspoken opposition to the passage of federal shield laws. In 2009, Sessions reportedly "stonewalled" the passage of a federal shield law,<sup>117</sup> and in 2013, he was as "obstructionist as possible" to a federal shield law's passage.<sup>118</sup> While Sessions's opinions on a federal shield law are not necessarily dispositive of his willingness or desire to subpoena reporters, his vehement opposition to increased protections for journalists is nonetheless a negative sign for future DOJ guideline revisions.

### III. DEVELOPMENTS THAT RENDER A FEDERAL REPORTER'S PRIVILEGE STANDARD FUTILE

While the creation of a uniform federal reporter's privilege standard could theoretically provide for more consistent treatment of reporters among federal jurisdictions, recent developments indicate that this is no longer a practical solution to the longstanding federal reporter's privilege debate. Specifically, the increased accessibility of digital communications between reporters and their confidential sources due to technological advances, along with the widespread use of NSLs to gather highly-personal information without a subpoena, indicate that the issues stemming from the lack of uniform protection for reporters and journalists are no longer rooted in the adoption or rejection of a testimonial privilege.

Rather, this Part argues that the ease with which the federal government can obtain the identity of sources of confidential information, regardless of whether the reporter is granted special testimonial protection, should now be considered the central concern of the reporter's privilege debate. First, advances in surveillance technology have given the government the means to investigate and

116. See *How Senators Voted on Jeff Sessions*, N.Y. TIMES (Feb. 8, 2017), [https://www.nytimes.com/interactive/2017/02/08/us/politics/jeff-sessions-confirmation-vote.html?\\_r=0](https://www.nytimes.com/interactive/2017/02/08/us/politics/jeff-sessions-confirmation-vote.html?_r=0) [https://perma.cc/RU2Z-34JH].

117. Cristina Abello, *Progress on Shield Bill Slows in Senate Judiciary Committee*, REPORTERS COMMITTEE FOR FREEDOM PRESS (Sept. 17, 2009), <http://www.rcfp.org/browse-media-law-resources/news/progress-shield-bill-slows-senate-judiciary-committee> [https://perma.cc/3RC6-GF3T].

118. Eli Hager, Alysia Santo & Simone Weichselbaum, *Here Are 8 Ways Trump's Pick for Attorney General Could Change Criminal Justice*, BUSINESS INSIDER (Nov. 21, 2016, 11:42 PM), <http://www.businessinsider.com/8-ways-jeff-sessions-could-change-criminal-justice-2016-11> [https://perma.cc/WSA5-KPFF].

indict whistleblowers such as Sterling, even without the reporter's testimony, through their tracking of online reporter-source communications. Second, the secret FBI rules recently leaked by *The Intercept* indicate that the government may have the authority to bypass the judicial and attorney general subpoena approval processes altogether through the issuance of a NSL, thereby rendering any protection against compelled testimony an inapplicable solution. Any argument in favor of a reporter's privilege that relies on its purported necessity must take these issues into account.

A. *Advances in Surveillance Technology*

As evidenced by the ten-count indictment of Jeffrey Sterling, technological advances have given the government the means to detect and locate alleged whistleblowers without the reporter ever taking the stand, thereby rendering the subpoena a less necessary tool for ascertaining the identity of newsgathering sources. As Judge Gregory emphasized in his *Sterling* dissent, there was extensive circumstantial evidence indicating that classified information was discussed between Risen and Sterling.<sup>119</sup> After discussing the magnitude of this evidence, Judge Gregory concluded that the government's investigations "yielded multiple evidentiary avenues that . . . may be used to establish what the Government sought to establish solely with testimony from Risen—that Sterling leaked classified information, rendering Risen's testimony regarding his confidential sources superfluous."<sup>120</sup> Two of these "evidentiary avenues" were the digital footprints between the two men, including phone records indicating that Sterling and Risen called each other seven times between February 27 and March 31, 2003,<sup>121</sup> as well as emails obtained through a forensic analysis of Sterling's computer referencing meetings and shared information.<sup>122</sup> Beyond these communications, the government was also able to obtain Risen's

119. *United States v. Sterling*, 724 F.3d 482, 526–27 (4th Cir. 2013) (Gregory, J., dissenting).

120. *Id.* at 527.

121. *Id.* This period of time is especially relevant because it came after Sterling's threats to come after the "CIA with everything at his disposal" made on January 7, 2003, and before Risen later informed the CIA on April 3, 2003, "that he had classified information concerning Classified Program No. 1 and that he intended to publish a story about it in *The New York Times*." *Id.* at 489 (majority opinion).

122. *Id.* at 527; Brief for the United States (Public Version), *Sterling*, 724 F.3d 482 (No. 11-5028), 2012 WL 123591, at \*11.

personal credit reports, credit card records, bank records, and even airline travel records.<sup>123</sup>

Even in the face of this undisputedly immense forensic evidence record, the government maintained that the information provided by Risen's testimony was "unavailable from other sources" and that the copious amount of circumstantial evidence was not a sufficient proxy for his direct testimony.<sup>124</sup> When viewed in light of Sterling's conviction, however, the falsity of this contention is plain. Even without a subpoena, the government was clearly able to use emails, phone records, and other electronically obtained evidence to connect Sterling to the disclosure of the classified *State of War* information.

The conviction in *Sterling* demonstrates the substantial impact that recent advances in technology—specifically surveillance techniques, such as the forensic analysis used on Risen's computer—have on the reporter's privilege debate. Although technological advancements have indeed simplified the job of a reporter, this is not without cost. Reporters and the government officials who serve as their confidential sources are increasingly leaving trails through their emails, cellphone records, credit card, and bank information.<sup>125</sup> Additionally, as exemplified through the personal investigations of Risen, the scope of these government investigations is no longer limited to work-related information; the DOJ has extended its whistleblower searches into the private lives of reporters, seizing home phone and cellphone records.<sup>126</sup> The increased accessibility of this information makes it more likely that the government will succeed in actually convicting the alleged whistleblower.<sup>127</sup> As explained by a spokesperson for then-Attorney General Eric Holder, many cases prosecuted under President Obama's administration "were easier to prosecute" because of the availability of

123. Memorandum of Points and Authorities in Support of Defendant's Motion for a Bill of Particulars at 6, *United States v. Sterling*, 818 F. Supp. 2d 945 (E.D. Va. 2011) (No. 1:10cr485), 2011 WL 1119853. Risen noted that the government "basically tried to get everything about me. I'm not sure what else they could have gotten except my kids' birth certificates." Charlie Savage, *U.S. Gathered Personal Data on Times Reporter in Case Against Ex-C.I.A. Agent*, N.Y. TIMES (Feb. 25, 2011), <http://www.nytimes.com/2011/02/26/us/26leak.html> [<https://perma.cc/F9JT-VEPM>].

124. See Brief for the United States (Public Version), *supra* note 122, at \*14, \*22.

125. Scott Shane & Charlie Savage, *Administration Took Accidental Path to Setting Record for Leak Cases*, N.Y. TIMES (June 19, 2012), [http://www.nytimes.com/2012/06/20/us/politics/accidental-path-to-record-leak-cases-under-obama.html?\\_r=0](http://www.nytimes.com/2012/06/20/us/politics/accidental-path-to-record-leak-cases-under-obama.html?_r=0) [<https://perma.cc/46SN-JL37>].

126. See Papandrea, *supra* note 107, at 460; Charlie Savage & Leslie Kaufman, *Phone Records of Journalists Seized by U.S.*, N.Y. TIMES (May 13, 2013), <http://www.nytimes.com/2013/05/14/us/phone-records-of-journalists-of-the-associated-press-seized-by-us.html> [<https://perma.cc/66AE-2U7B>] (discussing the DOJ's seizure of over twenty Associated Press journalists' personal telephone lines without notice); *supra* note 123 and accompanying text.

127. Papandrea, *supra* note 107, at 460.

“electronic evidence,” compared to prior cases in which “you needed to have the leaker admit [to whistleblowing] . . . or the reporter to testify about it[.]”<sup>128</sup>

These technological advancements implicate the identical concerns voiced by proponents of the reporter's privilege: revealing and prosecuting sources of confidential information will have a chilling effect on the free flow of *all* information, confidential or not. According to several journalists, these adverse effects are far from speculative. Some government officials are reportedly “reluctant to discuss even unclassified information with [journalists] because they fear that leak investigations and government surveillance make it more difficult for reporters to protect them as sources.”<sup>129</sup> As explained by another reporter, this fear is bolstered by the fact that “[t]here's a gray zone between classified and unclassified information, and most sources were in that gray zone. Sources are now afraid to enter that gray zone.”<sup>130</sup> These chilling effects are exacerbated even further in cases like Sterling's, where the government searches personal communications and records.<sup>131</sup> And surely the lengthy prison sentences issued to mid-level agents such as Sterling<sup>132</sup> strongly reinforce the desire for sources to remain silent, rather than jeopardize their entire livelihoods and sense of privacy.

Of course, not all communications between confidential sources and reporters happen electronically, and there are various methods available to reporters that allow these communications to remain private.<sup>133</sup> These alternative newsgathering techniques, however,

128. See Leonard Downie Jr., *CPJ Special Report: Leak Investigations and Surveillance in Post-9/11 America*, COMMITTEE TO PROTECT JOURNALISTS (Oct. 10, 2013), <https://www.cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php> [<https://perma.cc/NS67-TVVF>] (“‘And a number of cases popped up that were easier to prosecute’ with ‘electronic evidence,’ including telephone and e-mail records of government officials and journalists. ‘Before, you needed to have the leaker admit it, which doesn’t happen’ . . . ‘or the reporter to testify about it, which doesn’t happen.’” (quoting Matthew Miller, spokesman for Attorney General Eric Holder)).

129. *Id.*

130. *Id.*

131. *Id.*

132. See Peter Maass, *CIA's Jeffrey Sterling Sentenced to 42 Months for Leaking to New York Times Journalist*, INTERCEPT (May 15, 2015, 2:53 PM), <https://theintercept.com/2015/05/11/sterling-sentenced-for-cia-leak-to-nyt/> [<https://perma.cc/RUM9-63BK>]; Norman Solomon, *The Revenge of the CIA: Scapegoating Whistleblower Jeffrey Sterling*, EXPOSEFACTS.ORG (Jan. 15, 2015), <https://exposefacts.org/the-revenge-of-the-cia-scapegoating-whistleblower-jeffrey-sterling/> [<https://perma.cc/PVG2-SZNR>]; see also *supra* note 108 and accompanying text.

133. Edward Snowden's leaks have played an especially crucial role in increasing awareness of the government's surveillance abilities. See Tom Devine, *Protect the Whistleblowers: The Case for Pardoning Snowden*, HILL (Nov. 22, 2016), <http://thehill.com>

substantially inhibit the journalistic process. In a report conducted by Human Rights Watch, many journalists noted how they are now forced to rely on “burdensome and costly measures” to protect their sources, such as using burner phones, implementing expensive encryption techniques, and meeting face-to-face with their sources.<sup>134</sup> These methods not only impose a large financial burden on reporters, but also require them to expend a significant amount of time—time that would otherwise be devoted to the newsgathering and reporting processes—limiting the government’s ability to track their confidential communications. This is especially true in the case of face-to-face communications, which are not a realistic option for those who cannot afford frequent, long-distance travel.<sup>135</sup> Moreover, actually locating the source is often difficult, since some are incredibly reluctant to initially disclose their identities to reporters.<sup>136</sup> In sum, although there are alternatives to leaving an electronic trail, they are neither conducive to effective journalism, nor feasible for many reporters.

#### B. *National Security Letters*

A second indication that reporter subpoenas are becoming increasingly irrelevant stems from the recent exposure of classified FBI rules for issuing NSLs to telephone companies for records of reporters. NSLs are controversial tools<sup>137</sup> that permit the FBI to obtain information from companies about its consumers, without having to first obtain judicial approval or give notice to the targeted consumer, if that

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/blogs/pundits-blog/homeland-security/307280-protect-the-whistleblowers-the-case-for-pardoning [https://perma.cc/G2LW-J2CB]; Richard Stallman, *How Much Surveillance Can Democracy Withstand?*, WIRED (Oct. 14, 2013), <https://www.wired.com/2013/10/a-necessary-evil-what-it-takes-for-democracy-to-survive-surveillance/> [https://perma.cc/9HK5-LLCZ].

134. HUMAN RIGHTS WATCH, WITH LIBERTY TO MONITOR ALL: HOW LARGE-SCALE US SURVEILLANCE IS HARMING JOURNALISM, LAW AND AMERICAN DEMOCRACY 30–36 (2014), [https://www.hrw.org/sites/default/files/reports/usnsa0714\\_ForUpload\\_0.pdf](https://www.hrw.org/sites/default/files/reports/usnsa0714_ForUpload_0.pdf) [https://perma.cc/AT2C-DJUN].

135. *Id.* at 64.

136. *Id.* at 29–30.

137. See Ewelina Waśko-Owsiejczuk, *National Security Letters—A Controversial FBI Tool to Fight Terrorism*, 7 INTERNAL SECURITY 71, 72 (2015) (calling NSLs “one of the most controversial tools used by investigating authorities to fight terrorists”). In a report issued by President Obama’s Review Group on Intelligence and Communications Technologies, NSLs were referred to as “a form of administrative subpoena.” RICHARD A. CLARK ET AL., PRESIDENT’S REVIEW GRP. ON INTELLIGENCE & COMM’NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD 89, 91–92 (Dec. 12, 2013), [https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf) [https://perma.cc/4DTU-67XC].



information is relevant to a national security investigation.<sup>138</sup> Telephone, banking, and credit card records, along with email subscriber information, are the most common types of private data gathered by the FBI through these tools.<sup>139</sup> Moreover, targets of these FBI orders are sometimes precluded from divulging any details about the NSL issued against them—including the fact that one has even been filed—because of the gag orders that the FBI has the power to issue through the NSL.<sup>140</sup> While NSLs were originally created to protect the privacy of U.S. citizens, they are now considered to be a crucial tool in the government's domestic fight against terrorism.<sup>141</sup>

Even before the release of the secret rules governing telephone companies' records of reporters, the FBI's use of NSLs in this context has been publicly challenged in recent years. In 2013, an unnamed telecommunications company filed a petition in a federal district court to set aside an NSL and the accompanying gag order that had been issued on the theory that the gag order was unconstitutional.<sup>142</sup> Although the district court initially determined the contested NSL provisions suffered from "significant constitutional infirmities,"<sup>143</sup> this holding was

138. 18 U.S.C. § 2709(b) (2015) (stating that the FBI director "or his designee" is permitted to "request the name, address, length of service, and local and long distance toll billing records of a person or entity" that the director or his designee believes to be "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities"); see also Cora Currier, *Secret Rules Make It Pretty Easy for the FBI to Spy on Journalists*, INTERCEPT (June 30, 2016, 4:05 PM), <https://theintercept.com/2016/06/30/secret-rules-make-it-pretty-easy-for-the-fbi-to-spy-on-journalists/> [<https://perma.cc/5NCC-9G98>]; *National Security Letters: FAQ*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/national-security-letters/faq#3> [<https://perma.cc/H6PU-A8H8>].

139. CLARK ET AL., *supra* note 137, at 90.

140. *Id.* at 91. The gag order provision has been slightly loosened by the FBI in recent years. In 2014, former Director of National Intelligence James Clapper and former Attorney General Eric Holder announced that certain communications providers could make "more detailed disclosures" to their customers regarding the number of NSLs that had been issued to them and the number of customer accounts that were targeted. *Joint Statement by Attorney General Eric Holder and Director of National Intelligence James Clapper on New Reporting Methods for National Security Orders*, OFF. PUB. AFF., DEP'T OF JUST. (Jan. 27, 2014), <https://www.justice.gov/opa/pr/joint-statement-attorney-general-eric-holder-and-director-national-intelligence-james-clapper> [<https://perma.cc/5BGB-GW3B>]. Shortly after, Microsoft, Google, Facebook, and Yahoo publicized this data, which indicated that tens of thousands of customer accounts had been subject to these secret FBI orders. See Spencer Ackerman, *Microsoft, Facebook, Google and Yahoo Release US Surveillance Requests*, GUARDIAN (Feb. 3, 2014), <https://www.theguardian.com/world/2014/feb/03/microsoft-facebook-google-yahoo-fisa-surveillance-requests> [<https://perma.cc/2SGD-SRG9>].

141. See Waśko-Owsiejczuk, *supra* note 137, at 72–73 (discussing the origins of NSLs and their post-9/11 use).

142. *In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1065–66 (N.D. Cal. 2013).

143. *Id.* at 1066.

set aside in March of 2016 after a subsequent modification of the law.<sup>144</sup> Additionally, in July of 2015, after the DOJ confirmed the existence of secret NSL rules, the Freedom of the Press Foundation filed a Freedom of Information Act lawsuit against the DOJ demanding that the secret NSL rules be released.<sup>145</sup>

The release of secret FBI guidelines governing the use of NSLs to acquire information about reporters' telephone records has only exacerbated this ongoing controversy. In June of 2016, *The Intercept* released copies of the confidential NSL rules, which reveal the FBI's sparse requirements for the issuance of these tools in the context of gathering information from the media.<sup>146</sup> According to the leaked rules, NSLs that are issued with the purpose of targeting a journalist's records "to identify confidential news media sources" require (on top of the general NSL approval requirements) the additional approval of the FBI general counsel, the FBI executive assistant director, and the DOJ assistant attorney general for the National Security Division.<sup>147</sup> Essentially, these guidelines appear to give the FBI the power to conduct extensive, personal surveillance over reporters without judicial oversight, notice to the organization or specific journalist being targeted, approval from the attorney general, or any initial attempt to obtain this private information through other means, so long as these additional signoffs are received. Moreover, if the NSL is seeking records of nonmedia individuals, but the targeted information has a likely chance of revealing communications with a news organization, only the approval of the general counsel and executive assistant is needed—and thus, the DOJ's National Security Division approval is unnecessary.<sup>148</sup>

144. Redacted Order, *In re Nat'l Sec. Letters*, No. 11-2173, No. 13-80089, and No. 13-1165, at 2 (N.D. Cal. 2013), <https://www.eff.org/document/redacted-order> [<https://perma.cc/8Y23-CL5G>]. Congress amended 18 U.S.C. § 2709 and § 3511 through the passage of the USA Freedom Act of 2015. USA Freedom Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (codified in scattered sections of the U.S.C.).

145. Complaint for Injunctive Relief at 1, *Freedom of the Press Foundation v. United States Department of Justice*, (N.D. Cal. filed July 30, 2013), <https://assets.documentcloud.org/documents/2186709/fpf-nsf-foia-complaint.pdf> [<https://perma.cc/V8BY-MMYP>]. The suit eventually gained support from thirty-seven news organizations, including *The New York Times*, *The Associated Press*, *National Public Radio*, *USA Today*, and *Buzzfeed*. See Trevor Timm, *Dozens of News Orgs Demand DOJ Release Its Secret Rules for Targeting Journalists with National Security Letters*, FREEDOM PRESS FOUND. (June 15, 2016), <https://freedom.press/blog/2016/06/dozens-news-orgs-demand-doj-release-its-secret-rules-targeting-journalists-national> [<https://perma.cc/5ZG7-Q6UZ>].

146. See Currier, *supra* note 138.

147. *Id.* The NSL request must come from the FBI director, "or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director." 18 U.S.C. § 2709(b) (2015).

148. See Currier, *supra* note 138.

Because the process for obtaining a reporter's telephone records via an NSL is completely different than subpoenaing that reporter to testify, NSLs appear to provide the government with a means of obtaining information typically sought by subpoenaing a reporter without abiding by the DOJ guidelines. Consequently, the government's use of NSLs in the newsgathering context may not reflect the DOJ's stated policy "to provide protection to members of the news media from certain law enforcement tools . . . that might unreasonably impair newsgathering activities."<sup>149</sup> Instead, these rules indicate that as long as the NSL is relevant to a national security investigation,<sup>150</sup> the government has the means to bypass the DOJ guidelines because the reporter's testimony is unnecessary. Although NSLs are indeed an effective means of protecting national security interests, providing additional oversight over the use of NSLs in the newsgathering context would not inhibit this goal; it would simply reflect the government's prior acknowledgment of the importance of journalist-source communications.

The FBI's use of NSLs is likely to exacerbate the chilling effects on both sources and reporters already stemming from the lenient DOJ guidelines and increased advancements in surveillance technology.<sup>151</sup> Because sources fear the government's ability to turn "seemingly innocuous e-mails not containing classified information" into a crime,<sup>152</sup> the ease with which the FBI can obtain this extremely personal information through NSLs further diminishes the likelihood that sources will even communicate with members of the press, let alone disclose information to journalists—confidential or not. Considering the FBI's track record of abusing these national security tools,<sup>153</sup> even people who are completely innocent of any wrongdoing may be justified in fearing their electronic trails will be used against them. Additionally, the steps that journalist take to evade government intrusion into their work may also frustrate the newsgathering process. In 2014, *The Washington Post* reporter Barton Gellman publicly announced that he was "told his phone records were obtained at one point" through an NSL, which has led him to devote more time dealing with "technical and operational

149. 28 C.F.R. § 50.10(a)(1) (2016).

150. 18 U.S.C. § 2709(b) (2015).

151. See *supra* Sections II.B.3, III.A.

152. Downie Jr., *supra* note 128.

153. See CLARK ET AL., *supra* note 137, at 91–92 (citing OFF. OF INSPECTOR GEN., DEP'T OF JUST., A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (2007), <https://oig.justice.gov/reports/2014/s1410.pdf> [<https://perma.cc/T77J-RWFW>]) (explaining the "serious compliance issues" regarding the FBI's use of NSLs, many of which the FBI has since resolved).

security.”<sup>154</sup> Gellman noted that the time and effort he now spends “protect[ing] sources . . . from the sort of digital trails that will lead straight to them” is a “tax” on his reporting ability.<sup>155</sup>

### CONCLUSION

While the implementation of a federal reporter’s privilege has been viewed as the easiest and most effective remedy to the post-*Branzburg* inconsistency, the post-*Sterling* developments indicate that this is no longer a realistic solution when confidential information is at issue. The lenient and unenforceable DOJ guidelines do not provide adequate protection for reporters, and the revisions made in response to the *Sterling* controversy do very little to remedy this problem. Even if the guideline revisions had filled in some of the gaps, advances in surveillance technology and the FBI’s use of NSLs appear to have rendered the reporter subpoena an essentially useless tool by providing the government with the means to bypass the subpoena process altogether.

So long as the government is still able to gather information regarding confidential communications between a reporter and her source through other means, a federal testimonial privilege will be of little value to those that it is intended to protect. Only when the government is able to be truly transparent with its journalist surveillance techniques will the adverse effects begin to subside.

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154. Darren Samuelsohn, *Barton Gellman Aware of Legal Risks*, POLITICO (Feb. 25, 2014, 6:27 PM), <http://www.politico.com/blogs/media/2014/02/barton-gellman-aware-of-legal-risks-183998> [<https://perma.cc/J9C6-7RQZ>].

155. *Id.*

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